

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

KERWIN J. COLE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0603-CR-178

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0401-FB-007

October 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Kerwin Cole was convicted following a jury trial of criminal confinement and unlawful possession of a firearm by a serious violent felon, both Class B felonies, and intimidation, a Class D felony. He was sentenced to a total of forty years, with twenty-five years to be executed and fifteen years suspended. He now appeals his conviction and sentence. The State cross-appeals, contending that Cole's appeal should be dismissed for lack of jurisdiction. Agreeing with the State that Cole did not timely file his Notice of Appeal, we dismiss.

Facts and Procedural History

Cole was arrested and charged with multiple crimes following an altercation with his girlfriend at her house. A jury trial resulted in convictions of intimidation, criminal confinement, and unlawful possession of a firearm by a serious violent felon. On March 16, 2005, Cole was sentenced to forty years. On June 30, 2005, Cole filed a Motion for Permission to File Belated Notice of Appeal. The trial court granted the motion the same day. Cole's Notice of Appeal was filed on August 5, 2005. The Notice of Completion of Transcript was filed on October 31, 2005. On March 3, 2006, Cole filed a "Verified Motion to File Belated Appeal." In that motion, he alleges that due to a clerical error, his appellant's brief was not timely filed, and requests that he be granted permission to file a belated appeal pursuant to section 3 of Post-Conviction Rule 2. Cole's motion was granted per order of this court on March 10, 2006, and he was granted thirty-five days in which to file his brief. On May 4, 2006, Cole filed a "Verified Motion to File Belated Brief," in which he alleged that

he did not receive the court's order of March 10, 2006, and requested an additional fourteen days to file his brief. The motion was granted, and he was given until May 18, 2006, in which to file his brief. On May 18, 2006, Cole again requested an extension of time to file his brief, which was granted to and including May 30, 2006. Cole's brief was filed on May 24, 2006. The State was also granted two extensions of time and filed its Appellee's Brief on July 31, 2006.

Discussion and Decision

The State contends that we have no jurisdiction over this appeal because Cole's Notice of Appeal was not timely filed. Appellate Rule 9(A) provides that an appeal is initiated by filing a Notice of Appeal with the trial court clerk within thirty days after a final judgment. If a defendant fails to file a Notice of Appeal within thirty days as required, the right to appeal is forfeited unless sought under Post-Conviction Rule 2. Ind. Appellate Rule 9(A)(5); Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), trans. denied.

As the final judgment in this case was rendered on March 16, 2005, when Cole was sentenced, his Notice of Appeal was due by April 15, 2005. Cole did not file his Notice of Appeal by that date. Contrary to the State's assertion that Cole did not seek permission to file a belated notice of appeal from the trial court, however, the record shows that he did in fact seek and receive such permission from the trial court. Appendix at 4. When the trial court granted Cole leave to file a belated notice of appeal, the trial court's order had the effect of resetting the time limitations for pursuing an appeal. Cole therefore had thirty days from the date of the trial court's order in which to file his notice of appeal. The trial court's

order was dated June 30, 2005; thus, Cole had until August 1, 2005, to file his notice of appeal. Cole did not file his notice of appeal until August 5, 2005, however, and his right to appeal was forfeited at that point.

We note that the appeal proceeded as though the notice of appeal was timely filed, and when Cole requested leave from this court to pursue a belated appeal pursuant to section 3 of Post-Conviction Rule 2, it was granted. Such permission should not have been granted because Rule 2 specifically provides that a defendant “may petition the appellate tribunal . . . for permission to pursue a belated appeal . . . where he filed a timely notice of appeal” P-C.R. 2(3) (emphasis added). Absent a timely notice of appeal, this avenue of belated relief is not available to Cole.¹

Conclusion

Because Cole did not timely file his Notice of Appeal even after being granted permission to do so belatedly, we dismiss this appeal for lack of jurisdiction.

Dismissed.

BARNES, J., concurs.

SULLIVAN, J., dissents with opinion.

¹ We may reconsider a ruling by the motions panel. State v. Sagalovsky, 836 N.E.2d 260, 264 (Ind. Ct. App. 2005), trans. denied. However, “we decline to do so in the absence of clear authority establishing that it erred as a matter of law.” Oxford Fin. Group, Ltd. v. Evans, 795 N.E.2d 1135, 1141 (Ind. Ct. App. 2003).

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Appellee.)	

SULLIVAN, Judge, dissenting

I respectfully dissent.

The majority correctly quotes Post-Conviction Rule 2, Section 3. It states that a belated appeal lies where a convicted defendant has filed a timely notice of appeal but such appeal was not perfected or pursued. That section does not state, however, that under no other factual situation may a convicted defendant seek and obtain appellate review.

To the contrary, in my view, Post-Conviction Rule 2, Section 1 covers the situation, as here, in which the defendant fails to file a timely notice of appeal. It states that the trial court may, under such circumstances, grant leave to file a belated notice of appeal. The trial court did so here.

More importantly, however, the majority summarily opines that such a trial court order under Section 1 resets the time limitations for pursuing the appeal. The majority then makes the conclusory leap that such time limitation is the same limitation as that dictated by

Appellate Rule 9. Although such conclusion has some logical attraction, it has the effect of writing a new requirement into Post-Conviction Rule 2. Rewriting the Rule is not within the prerogative of this court.

Furthermore, I would grant deference to the various prior rulings of this court which brought the case to its present procedural posture. If my view of the interrelationship, or lack thereof, of Post-Conviction Rule 2, Section 1 with Appellate Rule 9 has any degree of merit, we cannot say that there is “clear authority establishing that [the motions panel] erred as a matter of law.” Oxford Fin. Group, Ltd. v. Evans, 795 N.E.12d 1135, 1141 (Ind. Ct. App. 2003), as quoted by the majority herein.

Accordingly I dissent from the dismissal of this belated appeal.